

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 1242 of 1996

For Approval and Signature:

Hon'ble MR.JUSTICE A.R.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
 2. To be referred to the Reporter or not?
 3. Whether Their Lordships wish to see the fair copy of the judgement?
 4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the Civil Judge?

CHANDRIKABEN D/O SHANKERPURI JIVANPURI GOSWAMI

Versus

ASHWINGIRI BECHUGIRI GOSWAMI

Appearance:

MR ABHIJIT JOSHI for Petitioner

MS ROOPAL R PATEL for Respondent No. 1

CORAM : MR.JUSTICE A.R.DAVE

Date of decision: 02/12/96

ORAL JUDGEMENT

By virtue of this Revision Application, the petitioner, original opponent in Hindu Marriage Petition No. 338/93 has challenged an order passed below Exhs. 23 and 25 dated 28th June, 1996 and final order passed below Exh. 1 in Hindu Marriage Petition No. 338/93 whereby Hindu Marriage Petition No. 338/93 was permitted to be withdrawn unconditionally by the Judge, City Civil Court, Ahmedabad.

Facts of the case in nutshell are as under :-

The present respondent had filed Hindu Marriage Petition No. 338/93 under provisions of Section 9 of the Hindu Marriage Act (hereinafter referred to as "the Act") praying for restitution of conjugal rights against the present petitioner on 21st September, 1993.

During pendency of the above referred proceedings, an application was given by the petitioner-wife on 7th March, 1996 praying for maintenance during pendency of the litigation. The said application was heard by the Judge, City Civil Court No. 13, Ahmedabad and was ultimately granted by an order dated 28th June, 1996. In the said order, it was directed that the present respondent-husband should pay a sum of Rs. 500/- per month towards interim maintenance to the petitioner-wife and a further sum of Rs.200/- per month towards maintenance of her daughter-Sonal. The said amount was to be paid with effect from the date on which application below Exh. 25 was given i.e. with effect from 7th March, 1996. The arrears were directed to be paid within a period of one month from the date of the order.

After the above referred order was passed, the present respondent-husband had given an application under Order 23, Rule 1 for withdrawal of Hindu Marriage Petition No. 338/93. The said application was granted on 8th July, 1996 and thereby Hindu Marriage Petition No. 338/93 was permitted to be withdrawn unconditionally.

Being aggrieved by the above referred two orders, the present petitioner-wife has approached this Court. Learned advocate Mr Abhijit Joshi appears for the petitioner and learned advocate Ms. Rupal Patel appears for the respondent-husband.

Learned advocate Mr Joshi appearing for the petitioner-wife has submitted that the impugned order dated 28th June, 1996 is bad in law for the reason that the trial Court had awarded the amount of maintenance with effect from the date on which the application for maintenance was given below Exh. 25. Learned advocate Mr Joshi has made no grievance with regard to quantum of the amount awarded by way of maintenance though, as per his submission, the said amount is much on lower side. Learned advocate Mr Joshi has submitted that it was prayed in application below Exh. 25 praying for maintenance that the amount of maintenance for the

petitioner-wife and her daughter-Sonal be awarded from the date on which Hindu Marriage Petition No. 338/93 was filed. In spite of the said fact, the trial Court had awarded the amount of maintenance with effect from the date on which the application below Exh. 25 - the application praying for maintenance was filed.

Learned advocate Mr Joshi has submitted that this Court has held in case of Janakbhai Ladva Vs. Bhavnaben reported at page 118 of 1990(1) GLR that whenever any application under Sec. 24 of the Act is given for maintenance during pendency of any litigation, the application can be granted in such a manner that the amount of maintenance is given from the date on which the proceedings are started. He has relied upon the above referred judgment to show that the Court has jurisdiction and is empowered to award the amount of maintenance from the date on which the proceedings under the Act are initiated. In the instant case, the respondent-husband had filed Hindu Marriage Petition No. 338/93 on 21st September, 1993 and, therefore, the proceedings under the Act had been initiated on 21st September, 1993. In the circumstances, as per submission made by Mr Joshi, maintenance ought to have been awarded with effect from 21st September, 1993 and not from the date on which application under section 24 of the Act was filed by the petitioner-wife.

Learned advocate Mr Joshi has also relied upon judgment delivered in case of Mrs Padma Pathak Vs. Vishnut Pathak, reported at page 861 in 1995 (1) GLH wherein the above referred case of Shri Janakbhai Ladva (1190 (1) GLR Page 118) has been referred to.

Another grievance which learned advocate Mr Joshi has made is with regard to withdrawal of Hindu Marriage Petition No. 338/93 by an order dated 8th July, 1996. He has submitted that in pursuance of an application given by the respondent-husband dated 5th July, 1996, which was submitted on 8th July, 1996 to the Court, the learned Judge passed an order on 8th July, 1996 whereby the respondent-husband was permitted to withdraw the proceedings. Mr Joshi has submitted that the order awarding maintenance was passed on 28th June, 1996. The arrears of maintenance payable under the said order were to be paid within a period of one month from the date of the said order i.e. 28th June, 1996. Learned advocate Mr Joshi has submitted that as the respondent-husband was saddled with the liability of making payment of maintenance to the petitioner-wife and her daughter, so as to avoid his liability, the respondent-husband had

given an application for withdrawal of the Hindu Marriage Petition No. 338/93. He has also submitted that in fact nothing has been paid to the petitioner-wife in pursuance of the order dated 28th June, 1996. In the circumstances, proceedings were being withdrawn with a malafide intention to defeat the provisions of section 24 of the Act and, therefore, the trial Court ought not to have permitted the respondent-husband to withdraw the proceedings.

Learned advocate Mr Joshi has relied upon a judgment delivered in case of Pratabbhai Trivedi Vs. Priyamvada reported in GLR 34 (1) at page 487. The said judgment pertains to provisions of Order 23, Rule 1 especially in relation to proceedings under provisions of the Act. Mr Joshi has drawn my attention to contents of para 10 of the said judgment which clearly denotes that there should not be unconditional withdrawal of a Hindu Marriage Petition under Order 23, Rule 1 if the other side has already given an application under provisions of Sec. 24 of the Act for maintenance. In the instant case, position is not different.

Learned advocate Mr Joshi has also drawn my attention to a judgement delivered by a Division Bench of Allahabad High Court in the case of V. Dube Vs. Har Charan reported in AIR 1971 All at page 41 which refers to a principle with regard to withdrawal of the suit. It is true that normally the plaintiff has a right to withdraw the suit as provided under Order 23, Rule 1, but there are cases where unconditional withdrawal should not be permitted for certain reasons. An illustration has been given in the above referred judgement which pertains to a suit for accounts. There may be cases where an absolute right of withdrawal of suit by the plaintiff might result into serious injury to or jeopardise some valuable right of the defendant. If such is the position, the Court might not permit the plaintiff to withdraw the suit.

Even in the instant case, as submitted by Mr Joshi, withdrawal of the application by the present respondent would adversely affect interest of the petitioner-wife because by virtue of order dated 28th June, 1996 the respondent-husband was directed to pay a sum of Rs.700/- to the petitioner towards maintenance for herself as well as for her daughter-Sonal. Upon withdrawal of the above referred application, right created in favour of the petitioner-wife and minor daughter-Sonal was to be adversely affect and in the circumstances, as submitted by Mr Joshi, unconditional

withdrawal of the Hindu Marriage Petition should not have been permitted by the trial Court.

In reply to the above referred submissions made by learned advocate Mr Joshi, learned advocate Ms. Rupal Patel has raised a preliminary objection to the effect that the Civil Revision Application is not maintainable in law. She has submitted that the impugned order dated 28th June, 1996 cannot be challenged by filing a revision application but she is not in a position to state the reason for which such a Civil Revision Application is not maintainable. She has submitted that the trial Court had decided the amount of maintenance on higher side without considering facts with regard to income of the respondent-husband. She has relied upon a judgment delivered in case of Jwala Prasad Vs. Smt. Meena Devi & others reported at page 130 AIR 1987 All. She has also submitted that the quantum determined by the trial Court is not reasonable. As this is not a revision application filed by the respondent-husband and as the petitioner-wife has not prayed for enhancement of amount of maintenance, the submissions made by Mis. Patel can not be taken into consideration.

She has further submitted that the order whereby interim maintenance was determined is not in the nature of counter claim and, therefore, it was open to the trial Court to permit the respondent-husband - applicant of Hindu Marriage Petition No. 338/93 to permit withdrawal of the application. She has also submitted that by permitting the respondent-husband to withdraw his application, the trial Court had not committed any error. In the circumstances, as per her submission, the impugned order permitting withdrawal is just and legal and, therefore, it should not be interfered with. She has also relied upon a judgment delivered in case of Shri M.L. Sethi Vs. R.P. Kapur by the Hon'ble Supreme Court and reported in AIR 1972 SC 2379 in support of her submission that this Civil Revision Application should not be allowed. In the instant case, as observed hereinbelow, the trial Court had wrongly permitted withdrawal of the petition and had thereby exercised its jurisdiction with material irregularity which has adversely affected rights of the petitioner-wife. In view of the facts of the case, I don't think that this revision application is not maintainable.

After hearing the concerned advocates and upon perusal of the impugned orders, prima facie it appears that the trial Court was not justified in passing the

impugned orders.

So far as order dated 28th June, 1996 is concerned, it is clear that by virtue of the said order, interim maintenance was to be paid by the respondent-husband with effect from the date on which the petitioner-wife had given an application under provisions of Section 24 of the Act. It is also pertinent to note that in the application made by the petitioner-wife, she had prayed for an interim maintenance with effect from the date on which Hindu Marriage Petition No. 338/93 was filed.

If we look at the legal position depicted in case of Janakbhai Ladva Vs. Bhavnaben (1990 (1) GLR 118), it is very clear that the amount of maintenance in such a case can be awarded with effect from the date on which the Hindu Marriage Petition is filed. If we look at the order dated 28th June, 1996 passed by the trial Court, it is very clear that the amount of maintenance is directed to be paid with effect from the date on which the petitioner-wife had given application for maintenance and no reason has been given by the trial Court for not awarding maintenance right from the date on which Hindu Marriage Petition No. 338/93 was filed.

In view of the above referred clear position, the impugned order dated 28th June, 1996 cannot be sustained and it is quashed to the extent it is against the petitioner-wife and it is directed that the amount of maintenance shall be paid to the petitioner-wife with effect from the date on which Hindu Marriage Petition No. 338/93 was filed.

With regard to the impugned order of withdrawal of the application, it is very clear that withdrawal of the application would adversely affect the petitioner-wife for the reason that by virtue of the said order, the petitioner-wife and her minor daughter-Sonal would not get the amount of maintenance. If we look at the judgement delivered in case of Pratapbhai Trivedi Vs. Priyamvada reported in 34 (1) GLR 487, it is very clear that unconditional withdrawal of an application in such circumstances would not be permissible. Para 10 of the said judgment clearly denotes that withdrawal of Hindu Marriage Petition under Order 23, Rule 1 of CPC is not permissible if the other party to the proceedings has already applied for payment of maintenance pending litigation and expenses of litigation under Section 24 of the Act. In such a case, the Court is required to decide the right of the applicant who has applied for

maintenance and costs of litigation. In the instant case, as I am told by the learned advocates that an application for costs had already been granted in the past and, thereafter, by an order dated 28th June 1996, application for interim maintenance has also been granted. In view of the above referred judgement and Division Bench judgment of Allahabad High Court which has been referred to hereinabove, it is clear that the trial Court ought not to have permitted withdrawal of the application. In the circumstances, the order permitting withdrawal of the application dated 8th July, 1996 is also quashed and set aside.

In the circumstances, Rule is made absolute with no order as to costs.

It is directed that the amount of maintenance payable to the petitioner-wife by the respondent-husband as directed by order dated 28th June, 1996 shall be paid to the petitioner-wife on or before 10th January, 1997. It is also directed that the amount of maintenance shall be paid with effect from the date on which Hindu Marriage Petition No. 338/93 was filed. One half of the additional amount which becomes payable by virtue of this order shall be paid on or before 31st March, 1997 and the remaining portion of the amount of maintenance shall be paid to the petitioner-wife on or before 30th June, 1997.

It is directed that Hindu Marriage Petition No. 338/93 shall proceed further as the impugned order permitting withdrawal thereof dated 8th July, 1996 has been quashed and set aside.
